SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1937

No. 919

RICHARD E. LANG, Executor, and GRACE E. LANG, Executrix, of the Estate of JULIUS C. LANG, Deceased,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF WASHINGTON'S BRIEF AMICUS CURIAE

WILLIAM H. PEMBERTON,

Special Assistant to [illegible]
General of the State of Washington,
Supervisor of Inheritance, Tax and
Division of the State Tax Commission.

121 Old Capitol Building, Olympia, Washington.

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STATE OF WASHINGTON'S BRIEF AMICUS CURIAE

QUESTION

Are the entire proceeds of the life insurance policy taken out by the husband on his life, subject to an estate tax under the community property laws of the State of Washington?

Washington Community Property Law

The community property statutes construed by the decisions of the Supreme Court of Washington disclose that, during the life of her husband, the wife has nothing that she can call her own so far as management, control or enjoyment is concerned. She can be deprived of her interest, both real and personal, in the community property by her husband, over her protest and without her signature, as though she does not exist.

Possession and Enjoyment Pass at Death

By the death of her husband the wife, for the first time, comes into the management, control and enjoyment of her interest in the community property, and it is therefore subject to a tax.

Wife Has No Vested Interest in Community Life Insurance

The wife has no vested nor other interest in a community life insurance policy that she cannot be deprived of by her husband against her will and over her protest and without her signature.

The Supreme Court of Washington, referring to this fact, in 1934 said:

"In view of that fact, the beneficiary (the wife) did not acquire a permanent or vested interest in the policy; all that she acquired was an expectancy." *Seattle Association of Credit Men v. Bank of California*, 177 Wash. 130 at 138, 30 Pac. (2d) 972.

Entire Community Life Insurance Taxable

The statute of the State of Washington taxes the "entire" proceeds of life insurance payable on the life of decedent, even though the community pays the premium, under the following provision:

"Insurance payable upon the death of any person shall be deemed a part of the estate for the purpose of computing the inheritance tax and shall be taxable to the person, partnership or corporation entitled thereto. Such insurance shall be taxable irrespective of the fact that the premiums of the policy have been paid by some person, partnership or corportaion other than the insured, or paid out of the income accruing from principle provided by the assured for such payment, whether such principal was donated in trust or otherwise: *Provided, however,* That there is exempt from the total amount of insurance, regardless of the number of policies, the sum of forty thousand dollars and no more; * * * " Session Laws of 1935, page 784, Rem. Rev. Stat. Supp. Sec. 11211b.

It is contended that since the premium upon this life insurance was paid by the community, the surviving spouse had a vested interest in one-half of the proceeds of this policy, and because vested, it is not subject to an estate tax.

If this be true, for any constitutional reasons, we assume then that the above statutes of the State of Washington taxing all the insurance payable upon the life of the decedent by the community would be unconstitutional.

The interest of the State of Washington in this controversy is apparent.

Vested Community Interest Taxable

This court in the case of *Moffitt v. Kelly,* 218 U. S. 400, 54 L. Ed. 1086, 31 Sup. Ct. 79, has already held that community property that is already vested is taxable upon the death of one of the spouses because possession and enjoyment arise upon the death of the husband.

This court said in the *Moffitt* case:

"It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the State of California has imposed an inheritance tax upon the share of the wife in the community and thereby taxed her as an heir of her husband, when if the laws existing at the time of the celebration of the marriage be properly construed and be held to be contractual she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property wase deferred and arose only on his death. But for the purpose of enforcing the Constitution of the United States we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because in determining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the State had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment arising upon the death of her husband was subject to be taxed by the State, so far as the Constitution of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern."

Of this decision Justice Roberts says in his dissenting opinion in *Coolidge v. Long,* 282 U. S. 582; 75 L. Ed. 562, 51 Sup. Ct. 54:

"Whatever may be said of the nature of the wife's interest in community property, this decision assumes the wife's vested interest in her behalf thereof; and that its free and unencumbered enjoyment only was postponed to the husband's death."

This was also the holding in the case of *Newman*

v. Commissioner Internal Revenue, 76 Fed. (2d) 449, in which certiorari was denied 296 U. S. 200, 80 L. Ed. 425. The same ruling was upheld in the *Circuit Court of Appeals en banc in American National Trust and Savings Association, Executor of the last wil land testament of Merton J. Price, deceased, v. Commissioner of Internal Revenue*, 90 Fed. (2d) 981.

In Louisiana the court states as follows:

"It has been held that the usufruct that a surviving spouse enjoys upon the deceased spouse's half of the community is not subject to the state inheritance tax because it arises because of the marriage contract, and is not an inheritance. *See Succession of Marshal*, 118 La. 212, 42 So. 778."

"This usufruct, however, is taxable under the Federal estate tax." *Liebman v. Fontenot* (D. C.) 275 Fed. 688.

DOWER AND CURTESY ARE VESTED INTERESTS

In Missouri the husband's interest in the wife's estate vests at the time of marriage, yet this is included as part of the gross estate for Federal estate purposes. *Kirkwood Estate*, Dec. 7081, 23 B. T. A. 955; *United States v. Waite*, 33 F. (2d) 567, certiorari denied, 50 Sup. Ct. 157.

In Nebraska the surviving spouse takes by operation of law, not by inheritance, and the state courts hold it not subject to inheritance tax, yet it is taxed for Federal estate purposes. *Allen v. Hennggelas, Adm.* (C. C. A.) 32 Fed. (2d) 69, Cert. denied, 50 S. Ct. 40.

In the case of *Nyberg v. United States*, 66 Ct. Cls. 153, holds that dower and curtesy in a Nebraska case is taxable and this court refused to issue writ of certiorari, thereby affirming the *Nyberg* case, and in the case of *United States v. Waite*, 33 Fed. (2d) 567, this holding

was affirmed by certoriarial denial of this case in 50 S. Ct. 157.

The right of curtesy vests immediately upon the birth of lawful issue of the marriage and continues during the life of the husband and is a vested interest prior to her death. 17 C. J. 516. Most of the states tax dower and curtesy regardless of the fact that they are a vested interest prior to the death, on the theory that the possession or enjoyment of the property is finally consummated at death.

"As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possesssion and enjoyment thereof." *Vanderbilt v. Eidman,* 196 U. S. 480, at 492, 49 L. Ed. 563, 25 Sup. Ct. 331.

In the case of *Tyler v. United States,* 281 U. S. 497, 74 L. Ed. 991, 50 Sup. Ct. 356, this court, in speaking of joint property, says (p. 503):

"The question, here, then, is not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon the result to be measured, in whole or in part, by the value of such rights."

It is not the vesting of the title that is the occasion of the tax, but

"The privileges enjoyed by the beneficiary of succeeding to the possession and the enjoyment of the property." *Saltonstall v. Saltonstall,* 276 U. S. 260, 72 L. Ed. 565, 48 Sup. Ct. 225.

"Termination of the power of control at the time of death inures to the benefit of him who owns the property

subject to the power and thus brings about at death the the property which is the real subject of the tax. * * *" completion of the shifting of the economic benefits of the property which is the real subject of the tax. * * *"

Chandler v. Kelsey, 205 U. S. 466, 51 L. Ed. 882, 27 Sup. Ct. 550.

Chase National Bank v. United States, 278 U. S. 327, 73 L. Ed. 405, 49 Sup. Ct. 126.

Under these authorities the tax is valid and constitutional even though there is no succession. All that is necessary is that upon death there is a termination of power and control and the beneficiary receives the possession or enjoyment to a greater degree as a result of the death.

ENTIRE COMMUNITY TAXABLE IN WASHINGTON

First. The husband has authority to sell, against the will and over the protest of his wife, any and all of the personal property by signing his own name, not as an agent, but as though he were the absolute owner. R. R. S., Sec. 6892; *Atwood v. McGrath*, 137 Wash. 400, 242 Pac. 648.

Second. The husband has the right to purchase any and all kinds of property against the will and over the protest of the wife. *Oregon Imp. Co. v. Sangmeister*, 4 Wash. 710, 30 Pac. 1058; *Bellingham Motors v. Lindberg*, 126 Wash. 684, 219 Pac. 19.

Third. The husband has the power by signing his own name alone to create a community indebtedness against the will and over the protest of his wife. *Bellingham Motors Corp. v. Lindberg, supra.*

Fourth. The creditor can obtain judgment against the husband in his own name and upon execution sell

both real and personal property of the community, regardless of the wishes of the wife. *Merritt v. Newkirk*, 155 Wash. 517, 285 Pac. 442; *Bellingham Motors Corp. v. Lindberg, supra.*

Fifth. The husband, without the wife and against her will and over her protest, has power to make an assignment to creditors which passes both the real and personal property of the community. *Thygeson v. Neufelder*, 9 Wash. 455, 37 Pac. 672.

Sixth. The husband has the power in his own name, against the will and over the protest of the wife, to bring suit for personal injuries to the wife and can settle the claim without the wife joining, contrary to her wishes, and release all claims arising from such injuries. *Schneider v. Biberger*, 76 Wash. 504, 136 Pac. 701; *Ostheller v. Spokane & Inland Empire R. Co.*, 107 Wash. 678, 182 Pac. 630.

Seventh. The husband, against the will and over the protest of the wife, may take out insurance either upon his life or the life of his wife. *Bellingham Motors Corp. v. Lindberg, supra; Seattle Association of Credit Men v. Bank of California*, 177 Wash. 130 at 138, 30 P. (2d) 972.

Eighth. The husband, against the will and over the protest of the wife, can sell this insurance or assign it as collateral to any debt he owes without the wife joining. *Seattle Association of Credit Men v. Bank of California, supra.*

Ninth. The husband has the power to collect all the income from all the real property, as well as the personal property, and invest it or pay it upon his debts regardless of the wishes of the wife. *Norman v. Levenhagen*, 142 Wash. 372, 253 Pac. 113.

But the husband cannot give away the community property. *Occidental Life Insurance Co. v. Powers,* 92 Wash. Dec. 425, 74 Pac. (2d) 27; *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111.

The above statements have reference to community property alone and do not refer at all to the separate property of either spouse.

The above shows the possession, power of control, in the husband of the community property. The following indicates the wife's lack of control:

First. The wife cannot sell any part of the personal property. R. R. S. Sec. 6892; *Blum v. Smith,* 66 Wash. 192, 119 Pac. 183.

Second. The wife cannot go in debt and bind the community. *In re Finn's Estate,* 106 Wash. 137, 179 Pac. 103; *Jones-Rosquist-Killen Co. v. Nelson,* 98 Wash. 539, 167 Pac. 1130.

Third. The wife alone cannot sell her interest in the real property. R. R. S. Sec. 6893; *Olson v. Springer,* 60 Wash. 77, 110 Pac. 807.

Fourth. The wife cannot *take out life insurance* upon her own life or upon that of anyone else. *Blum v. Smith, supra; Jones-Rosquist-Killen Co. v. Nelson, supra.*

The above has relation to community transactions only.

Community Deceased

One of the first questions to arise under the community property law is whether or not upon the death of one of the spouses the joint community property should be administered upon, or upon the half of the community property belonging to the deceased spouse.

The following are the quotations taken from the leading opinion upon this question in the case of *Ryan v. Ferguson,* 3 Wash. 356, 28 Pac. 910:

"The interest of the surviving member in the community property may be likened to that of a lineal heir of the deceased." (Page 362.)

"Such interest should be treated the same as that of the heir or devisee." (Page 363.)

"It may be said that the community was deceased also—it ended with the death of the husband." (Page 366.)

Then the court defines the meaning of the words "estate of the deceased."

"The 'estate of the deceased,' so far as the payment of the debts against the community was involved, was the community estate." (Page 367.)

Possession, Control and Enjoyment Pass to Surviving Wife Upon Death of Husband

In fact, so far as the community property is concerned, the wife has no possession, no control, no management, no enjoyment, except what the husband confers upon her.

All the community property, both real and personal, can be sold for the debts incurred by the husband in the management of the community property without the wife being consulted, or over her protest and without her name even appearing in any of the proceedings, the same as though she did not exist.

The State of Washington is interested in this case first, for the reason that a decision may effect the taxability of community life insurance under the statutes of the State of Washington; second, for the reason that the State of Washington is entitled to 80% of the Federal estate tax under the 1926 Revenue Bill.

There are greater rights accruing to the wife in the community upon the death of the husband than there is accruing to the wife on the death of the husband in the joint tenancies, tenancies by entireties or dower, and if these confer such possession and enjoyment that makes them subject to estate taxes, then it cannot be claimed that the wife's community interest is not subject to estate taxes upon the death of her husband.

Upon the death of the husband there is something that passes in a community insurance policy that could not pass if it were not for his death, and this death is what generates the right to the property, the possession and enjoyment. This is the first time the wife secures this right and it is subject to tax. Upon the death of her husband the whole community life insurance is taxable.

Respectfully submitted,

WILLIAM H. PEMBERTON,

Special Assistant to G. W. Hamilton, Attorney General of the State of Washington, and Supervisor of Inheritance Tax and Escheat Division of the State Tax Commission.

SUPREME COURT OF THE UNITED STATES.

No. 919.—October Term, 1937.

Richard E. Lang, Executor, and Grace E. Lang, Executrix, of the Estate of Julius C. Lang, Deceased,
vs.
Commissioner of Internal Revenue.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 16, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Circuit Court of Appeals has certified propositions of law concerning which instructions are desired for decision of a pending cause. U. S. C. A., Title 28, § 346.

In 1905 Julius C. Lang married in the State of Washington, where community property laws have long obtained, and both parties continued to be domiciled there until he died in 1929. At his death seventeen policies of insurance upon his life—totaling above $200,000.00—were in force. Each policy required advanced payment of one premium. Fourteen specified the wife as sole beneficiary; children were the beneficiaries in three. Three of those payable to the wife were obtained by the assured prior to marriage and early premium payments upon them came from his separate property; later ones from community funds. Application for fourteen policies followed the marriage and all premiums thereon were paid from community funds.

The Commissioner of Internal Revenue ruled that under § 302(g), Revenue Act 1926, c. 27, 44 Stat. 9, the entire proceeds from all policies should be reckoned as part of the assured's gross estate subject to the permitted exemption of $40,000. and made an assessment accordingly. The Board of Tax Appeals affirmed.

The exemption is not controverted and by admission each policy permitted the assured to change the beneficiary. The point for consideration is whether all or any portion of the proceeds of a policy, premiums on which were paid out of community funds, must be treated as part of the decedent's gross estate.

The court below concluded that the laws of Washington establish a community between spouses which is a separate entity, "just as a corporation or an association", and that life insurance pur-

chased with its funds is community property whose character the husband cannot defeat through change of beneficiary.

Accepting as correct, for present purposes, this construction of the local law, also treating the facts disclosed by the certificate as the essential ones, we come to consider the questions submitted for instructions which are restated in order more definitely to indicate our understanding of their significance.

The construction of the local law approved below is certainly a tenable one and finds support in *Graham* v. *Commissioner,* 95 F. (2d) 174, Ninth Circuit March 4, 1938; *Occidental Life Co.* v. *Powers,* Supreme Court of Washington, December 6, 1937; *Poe* v. *Seaborn,* 282 U. S. 101, 113.

Occasion for the certificate did not arise from doubts relating to the meaning of the community property laws of Washington, but from uncertainty concerning the application of the 1926 Revenue Act to an estate under administration in that State. The court was perplexed by *Bank of America* v. *Commissioner of Internal Revenue,* 90 F. (2d) 981, 983, which affirmed that the operation of that Act is not dependent upon local law and "therefore whatever the local law may be we believe it to be immaterial." This statement is not accurate and conflicts with what we have said. *Poe* v. *Seaborn,* 282 U. S. 101, 111, 112; *Blair* v. *Comr.,* 300 U. S. 5, 9, 10.

1. Must the total or only one-half of the proceeds collected under the insurance policies issued after marriage on the deceased husband's life be reckoned as part of his gross estate, the wife being sole beneficiary and all premiums having been paid from community funds? To this we answer, only one-half.

2. Must the total proceeds of the policy upon a decedent's life, taken out after marriage, children being the sole beneficiaries, and all premiums having been paid from community funds, be reckoned as part of his gross estate; or, in the circumstances, is only one-half to be included? To this we reply, only one-half should be included.

3. Must all proceeds of the policies issued before marriage upon the deceased husband's life be reckoned as part of his gross estate, the wife being sole beneficiary, the first premium having been paid from his separate funds, and all subsequent ones from community funds; or, in the circumstances, is the total received under the policy reduced by one-half of that proportion of such total which premiums satisfied with community funds bear to all premiums paid, the amount to be regarded as belonging to the gross estate? To

this we reply, only the total proceeds less one-half of the indicated proportion becomes part of the gross estate.

Section 301 Revenue Act 1926, *supra,* imposes a tax upon the transfer of the net estate of every decedent, etc. And § 302 provides—

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—[(a), (b), (c), (d), (e), (f).]

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The Revenue Acts of 1918, 1921 and 1924 contain similar provisions relative to "policies taken out by the decedent upon his own life".

Treasury Regulations 37 promulgated under the Revenue Act of 1918 provide—

"Art. 32. . . . The term 'insurance' refers to life insurance of every description . . . Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance should not be included in the gross estate, even though the application is made by the decedent, where the premiums are actually paid by some other person or corporation, and not out of funds belonging to, or advanced by, the decedent. . . . "

And there are similar provisions in Treasury Regulations 63, Art. 27, promulgated under 1921 Revenue Act.

Treasury Regulations 68 promulgated under the Revenue Act 1924—

"Art. 25. . . . .

"The term 'insurance' refers to life insurance of every description . . . . Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid."

"Art. 28. The amount to be returned where the policy is payable to or for the benefit of the estate is the amount receivable. Where the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, and all the premiums were paid by the decedent, the amount to be listed on Schedule C of the return is the full amount receivable, but where the proceeds are so payable and only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that proportion of the insurance receivable which the premiums paid by the decedent bears to the total premiums paid. . . ."

Arts. 25 and 28, Treasury Regulations 70, promulgated under Revenue Act 1926, contain provisions identical with those just quoted.

Treasury Regulations 70 were in force when Lang died and are applicable to his estate. It is unnecessary for us to consider the meaning, validity or effect of the changes introduced by Regulations 80.

Articles 25 and 28 of Regulations 70 defines the words "policies taken out by the decedent upon his own life". Earlier regulations gave the same definition. Nothing else appearing, it must be treated as approved by Congress. *Helvering* v. *Bliss*, 293 U. S. 144, 151. Counsel for the Commissioner suggest that it is at variance with the statute, unreasonable and without effect; but we think this objection is clearly untenable.

Under the community property statutes of Washington, as interpreted below, one-half of the amounts of community funds applied to payment of premiums was property of the wife. To that extent she paid these premiums. Where she is the beneficiary, under the words of the Regulations she became entitled to the proceeds of the policy in proportion to the amount so paid.

Where children were named beneficiaries and premiums were paid from community funds the situation is not within the precise words of the Regulations; but the rather obvious reason underlying the definition of what constitutes a policy "taken out by the assured" should be respected. In the absence of a clear declaration it cannot be assumed that Congress intended insurance bought and paid for with the funds of another than the insured and not payable to the latter's estate, should be reckoned as part of such estate for purposes of taxation. See *Iglehart* v. *Comr.*, 77 F. (2d) 704, 711.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.